

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DEMETRIUS BROWN,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 04-379E
)	
U.S. JUSTICE DEPARTMENT,)	JUDGE MCLAUGHLIN
BUREAU OF PRISONS, FCI MCKEAN)	MAGISTRATE JUDGE BAXTER
WARDEN JOHN J. LAMANNA,)	
REGIONAL DIRECTOR D. SCOTT)	Electronically Filed
DODRILL, MEDICAL DIRECTOR,)	
DIRECTOR HARLEY G. LAPPIN,)	
)	
Defendants.)	

**UNITED STATES' MOTION TO STRIKE
DEMAND FOR TRIAL BY JURY**

Pursuant to Rule 39(a)(2) of the Federal Rules of Civil Procedure, defendant the United States of America, by its undersigned counsel, files the following Motion to Strike Demand for Trial by Jury, and in support thereof states as follows:

1. *Pro se* prisoner Demetrius Brown filed a Complaint in the above-captioned action under the provisions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.* In the Complaint, plaintiff seeks \$10 million in damages for personal injuries allegedly caused by plaintiff's alleged exposure to secondhand smoke during his incarceration at a federal prison located in McKean County, Pennsylvania ("FCI McKean").

2. Plaintiff subsequently filed a Motion to Amend Complaint Correcting Typographical Error and Adding Cure to Jurisdictional Deficiency, which was granted by Order dated May 9, 2005.

3. At the time the Complaint and Amended Complaint were filed, plaintiff demanded a trial by jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure.

4. In pertinent part, 28 U.S.C. § 2402 states as follows: "Any action against the United States under Section 1346 [of Title 28] shall be tried by the Court ***without a jury.***" (Emphasis added).

5. Inasmuch as plaintiff's claim is brought pursuant to the FTCA, with jurisdiction based upon 28 U.S.C. § 1346(b), and inasmuch as a right of trial by jury does not exist for such a claim, plaintiff's actions against the United States must be tried by the Court without a jury.

6. A Brief in Support of this Motion is being filed simultaneously herewith and the contents therein are incorporated in this Motion by reference.

WHEREFORE, defendant the United States of America respectfully requests that the Court issue an order granting their motion and striking plaintiff's demand for a trial by jury.

A proposed order is attached.

Respectfully submitted,

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/s/ Megan E. Farrell
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Dated: January 3, 2006